HOUSE..... .....No. 51

REPORT

ON THE

TRIAL BY JURY,

IN

QUESTIONS OF PERSONAL FREEDOM.

Commonwealth of Massachusetts.

House of Representatives, March 27, 1837.

The Committee on the Judiciary, to whom was referred an order of January 20th, directing them to inquire into the expediency of "restoring the writ de homine replegiando, or of providing some other process by which one under personal restraint may try his right to liberty before a jury;" and to whom was also referred the petition of Gilbert H. Durfee and others, citizens of Fall River, praying "the passage of such laws as will secure to those claimed as slaves in this Commonwealth a trial by jury," and other petitions in aid of the same object, beg leave respectfully to

REPORT:

A distinction must be taken in the outset between the *order* and the *petitions*. The order directs an inquiry into the expediency of restoring the trial by jury, on all questions of personal freedom, by the old writ *de homine replegiando*, or some similar process, which would be available for all persons held in unlawful restraint; and which might or might not be applicable to the case of those claimed as "fugitives from labor," as other questions of legal effect and constitutional authority should be

decided. On the other hand, the petitioners directly raise these questions, which the order does not touch. They make the case of persons seized as fugitive slaves the whole ground of their complaint against the existing laws. They allege that the process of delivering up such fugitives, in use under the supposed authority of the U. States, is unlawful; that from the looseness and informality of the proceedings, with which it is connected, free citizens of this Commonwealth are liable to be, and are seized as slaves, and on ex-parte affidavits hurried away, to be sold in other States into hopeless bondage; and they ask of this Legislature the enactment of laws, which shall secure to every person claimed as a slave, what they insist to be his constitutional right, a trial by jury.

Aside from the interesting and delicate questions thus presented by the petitions, the Committee would not have hesitated in reporting a bill in conformity with the object of the order. They believe the furnishing of such a remedy as is made the subject of this inquiry, to be a measure, without reference to its effect upon those claimed as fugitives from labor, if not of constitutional obligation, at least of the highest political wisdom, and necessary to the completeness and perfection of our system. It would be useless here to discuss the merits of the trial by jury. It is justly dear not only to the citizens of Massachusetts, but to the whole American people, who have always guarded it with a solicitude, which is the best evidence of their estimate of its worth. Our fathers brought it with them from England, as one of the free elements of her institutions—one, which had been the safeguard of all the rest, and the renewed security of which the people there ever first demanded in every one of those concessions

to their rights, which in times of violence and danger were wrung from reluctant authority. The very first law "for the general good of the colony of New Plymouth," (1623) was "that all criminall facts, and also all matters of trespasses and debts betweene man and man, should be tried by the verdict of twelve honest men, to be impannelled by authority in forme of a jury upon their oath;" and the same principle is to be found in the fundamental laws of all the colonies. Our fathers never lost sight of, or yielded this principle, for a moment. In the declaration of national rights, in 1774, they claimed the trial by jury as "their birthright and inheritance," and when our independence was secured, it was guarded by constitutional provisions in every State in the country. When the constitution of the United States was proposed for adoption, it was found that it recognized and established the right only in the trial of crimes. This produced great dissatisfaction among the people. They were unwilling that this "sacred" privilege, even in civil cases, should rest upon the vacillating policy of legislation, and demanded that it should be placed on "the high ground of constitutional right." The constitution was nevertheless adopted, with the general understanding that this deficiency would be supplied. And accordingly the first congress proposed an amendment, extending this mode of trial to all civil cases, where the amount in dispute should exceed twenty dollars. The Committee will have occasion to allude to these principles in the constitution of the United States hereafter. At present, they refer to some provisions of our own State constitution. Art. xii. of the first part contains the great principle of the "magna charta," which has received a settled construction, i. e. "that no subject shall be arrested, imprisoned, despoiled or deprived of his property, immunities or privileges, put out of the protection of the

law, exiled, or deprived of his life, liberty or estate, but by the judgment of his peers, or the law of the land." Again, in the xvth article: "In all controversies concerning property, and in all suits between two and more persons, except in cases in which it has heretofore been otherways used and practiced, the parties have a right to the trial by jury; and this method of procedure shall be held sacred, unless in causes arising on the high seas, and such as relate to mariners' wages, the Legislature shall hereafter find it necessary to alter it."

Before the Committee examine more particularly these provisions, they would take a short view of the history of the writ *de homine replegiando*, which furnished the only mode, ever known in this Commonwealth, by which the question of the right to personal freedom could be directly passed upon by a jury.

This writ existed as a part of the common law; and, suited as it was to the wants, condition and institutions of our ancestors, it needed no formal enactment to give it force in the colonies. It remained thus, a part of the unwritten law of the land, till 1786, when its provisions, slightly modified, were incorporated in a statute, which was left untouched by subsequent legislation, till the recent revision of our whole statute law. The Commissioners, to whom this great work was, in the first instance, entrusted, reported the writ with considerable alterations, and in a note especially recommended its readoption, though, for reasons entirely aside from the great principle which lies at its foundation. It passed through the legislative committee of revision, receiving from them the more popular and appropriate name of "the writ of personal replevin." But in the Senate, all the provisions relating to this subject were stricken out, and the single

section inserted instead, as if for the very purpose of preventing the revival of the writ at common law,—"The writ de homine replegiando is abolished." The amendment was concurred in by the House of Representatives without question, and thus, without one word of debate, was blotted from our laws the only remedy, by which one of the dearest rights of a citizen is secured to him, in its application to a subject of vital interest. It is to be presumed that this was done in inadvertence, or, at any rate, without adequate consideration. Be this as it may, your Committee cannot hesitate in recommending that the provisions of this writ be immediately restored to our laws.

If a minute verbal criticism or an attenuated logic could otherwise satisfy the obligations of the constitution, in its words, who can doubt that such a course is required by its intention and spirit?—Who, that knows the extreme jealousy of freedom, which was the characteristic of the times, can believe that the founders of our constitution intended to hold the trial by jury "*sacred*" on every question of dollars and cents, however insignificant, and in relation to the slightest misdemeanors, and to deny it on the great question of personal liberty? that they would yield it as a *right* to every man for the investigation of his title to an ox or a horse, and withhold it on a trial which involved the ownership of his own limbs and faculties—in one word his ownership of himself? And, aside from the question of obligation, ought not the *principle* which lies at the bottom of these provisions of our fundamental law, to be as dear to us as to our fathers? And is it not clearly applicable to this subject?

The committee, in reporting the accompanying bill, re-

storing the writ thus unceremoniously abolished, substantially in the form recommended by the commissioners, by no means suppose that it will supersede the writ of *habeas corpus.* This last named remedy has, in the investigation of questions of mere law, or requiring immediate action, such obvious advantages, that it will never be thrown into disuse; and, with our present judiciary, it will undoubtedly be wisely and purely administered. But it is unsuited in its forms to the trial of facts, and the decisions under it are always by the court, and generally by a single judge. It lacks the great principle, which the Committee have endeavored to illustrate, and which seems to require a concurrent remedy, giving to the party a trial by jury at his election.

Thus far your Committee proceeded without hesitation. But the petitions present subjects of vastly greater difficulty. The mode of delivering up fugitive slaves is made, or at any rate is attempted to be made, a matter of national regulation. An act of Congress prescribes this mode, and that act, if "in pursuance of the constitution," is paramount to all state authority. In order to understand the question, it is necessary to consider particularly the provisions of the constitution, and the law of Congress upon this subject, in connexion. The last paragraph of Art. iv. § 2 of the constitution, is in these words: "No person held to labor and service in one State under the laws thereof, escaping into another, shall, in consequence of any law or regulation therein, be discharged from such service or labor, but shall be delivered up on claim of the party to whom such labor or service may be due." This provision was unanimously adopted in the convention, which formed the constitution, and is one of the many concessions which were made to the

demands of the South, and although it imposed a duty upon Massachusetts in derogation of her common law and the spirit of her institutions, (which would otherwise have made every human being free who should have come within her borders,) she cannot shrink from performing, to the full, every part of the contract into which she voluntarily entered. The second Congress of the U. States passed an act prescribing, among other things, the manner in which fugitives from labor in other States should be seized and delivered up. The act is of the 12th February, 1793. The third section provides, that "when a person held to labor in any of the United States, or in either of the territories northwest or south of the river Ohio, under the laws thereof, shall escape into any other of the said states or territories, the person to whom such labor or service may be due, his agent or attorney, is hereby empowered to seize or arrest such fugitive from labor, and to take him or her before any judge of the circuit or district courts of the United States, residing or being within the state, or before any magistrate of a county, city or town corporate, wherein such seizure or arrest shall be made, and upon proof, to the satisfaction of such judge or magistrate, either by oral testimony or affidavit, taken before and certified by a magistrate of any such state or territory, that the person so seized or arrested doth, under the laws of the state or territory from which he or she hath fled, owe service or labor to the person claiming him or her, it shall be the duty of such judge or magistrate to give a certificate thereof to such claimant, his agent or attorney, which shall be sufficient warrant for removing said fugitive from labor to the state and territory from which he or she fled." The

next section imposes a penalty of $500, upon any person, who shall hinder such arrest or rescue the fugitive.

It was apparently the purpose of some of the petitioners, though not directly proposed by them, that the trial by jury should be secured to the persons claimed as fugitive slaves, not by any independent enactment, but by engrafting a provision, effecting this object, upon the proceedings under the law of the United States. Your Committee are of opinion that this cannot be done. If the law of Congress be unconstitutional, as they allege, such a provision would be useless; and if it be otherwise, such a course would obviously be beyond the powers of State legislation. It is true indeed, on many subjects, within the legitimate power of Congress, that, in the absence of any action by them, the States may legislate; but this clearly cannot be, when Congress has exercised its power in the enactment of a law, evidently intended to cover the whole subject, and when, as in this case, the spirit and object of that law would be defeated by the proposed action of the State.

There is another difficulty, which, perhaps may as well be noticed in this connexion. The Committee believe that such a measure would be unauthorized because it would attempt to regulate the proceedings of the judicial tribunals of the United States. It is true that, by the act before quoted, the trial (so far as any trial is provided for) of the right of the master, may as well be before a state magistrate as the judges of the Circuit and District Courts. But your Committee, after a full investigation of the question, believe that this part of the law is unauthorized and void. It is a well settled principle, that Congress cannot confer any part of the judicial power of the United States on state magistrates or officers. In

the language of the Supreme Court of the United States, (1 Wheaton, 304) "Congress cannot vest any portion of the judicial power of the United States, except in courts ordained and established by itself," and by a well settled construction, in order to give courts and magistrates this character, the *persons* filling the stations respectively, must be appointed and commissioned by the government of the United States, under a previous law of Congress. This doctrine was maintained in the celebrated case of Martin *v.* Hunters Lessees (1 Wheaton 304) and has not only been since recognized in the Supreme Court of the United States, but by repeated decisions of the highest tribunals of various states. It grows out of the express provisions of the Constitution. Art. iii. § 1 provides that "the judicial power of the United States shall be vested *in one Supreme Court, and in such inferior courts as Congress may, from time to time, ordain and establish*," *&c.* What then is the judicial power of the United States? The second section of the same article answers this question. "The judicial power shall extend to *all cases* in law and equity, arising *under this Constitution, the laws of the United States*, and treaties made" &c. We have already stated the construction, which has been put upon these clauses by the Supreme Court of the United States, and although the principle which they deduced from them, was at first doubted, it is now supported by a great preponderance of authority.

We refer to a few of the cases in the state courts; and first, to *Commonwealth* vs. *Feely,—Virginia cases*, 321. This was an indictment for robbing the mail, under an act of Congress which gave, in express terms, jurisdiction to the state courts of the offence. But the court of errors, in Virginia, decided that they could not, under

the constitution, exercise it; and the whole court, (consisting of judges White, Stewart, Brockenborough, Sample, Allen, Randolph, Dabney and Daniel,) entered the following judgment: "The court doth unanimously decide that, as the offence described in the indictment in this case *is created by an act of Congress*, the said superior court, being a state court, hath not jurisdiction thereof." There is a case, similar in principle, in 6 Hall's L. J. 113, United States *v.* Campbell. (See also the opinion of Judge Cheves, of South-Carolina, 12 *Niles' W. Reg.* 266, *in ex-parte Rhodes;* and the opinion of Judge Bland, of Penn. in the case of *Joseph Almeida, ibid* 259.)

The same question came before the supreme court of New York, in *United States* v. *Lathrop*, 17 *Johns'* 4. This was an action of debt, brought to recover a penalty of $150, under the act of Congress, passed Aug. 2, 1813, for selling by retail spirituous liquors contrary to the provisions of that act, which, in terms, authorized the state courts to take jurisdiction of offences prosecuted under it. The court decided, that Congress could not invest them with such a jurisdiction, and they dismissed the cause.

The case of *Ely* v. *Peck*, 7 *Conn. R.* 239, was an action brought on a statute law of the United States, to recover damages, which the plaintiff, as owner of a schooner, had sustained by the desertion of the defendant. This act also, in terms, conferred jurisdiction of the subject upon the state courts; but the supreme court of Connecticut declined to act under it, holding that "Congress cannot vest any portion of the judicial power of the United States except in a court ordained and established by itself," and that the "state courts are not ordained nor established by Congress, and are not amenable to that body."

For a further discussion of these questions, the Committee refer to Houston *v.* Moore, 5 Wheaton 35; 3 Story's Com. 622–625; Sargent's Const. Law, ch. 27–8; 1 Kent's Com. 395–405; United States *v.* Bailey, 9 Peters, 328.

It is admitted, in the discussion of these questions, that there are large classes of cases where the courts of the United States and of the several States may rightfully exercise concurrent jurisdiction; but this does not come within either of these classes. It is enough perhaps to say upon this point, that no such power can be communicated by Congress to a tribunal established by the State, which had not jurisdiction upon the subject matter previous to the constitution, and which has not, *in itself*, an inherent power adequate to the performance of the duty enjoined upon it; and in no instance can it be exercised in violation of state obligations. (See 3 Story's Com. and Kent's Com. *ubi supra.*) In relation to the power attempted to be communicated to magistrates by the law of the U. States, upon the subject of fugitive slaves, it is to be remarked, that it wants for its exercise every one of these requisites. The subject matter is one exclusively growing out of the constitution and laws of the United States. No state courts had any jurisdiction, in this form, of the subject previous to the constitution, nor have they any adequate inherent jurisdiction, but their whole power over the subject, if it exists at all, must be derived from the act of Congress; and it might be added, if it were necessary, that the exercise of such a power would be against the state obligations of magistrates in Massachusetts, for the proceedings enjoined by Congress are not only in derogation of our common law, but their form is in violation of the express provisions of our constitution.

The doctrine upon this subject, which the Committee have endeavored to establish, leads to the conclusion, that the law of Congress is void, only so far as it attempts to vest power in state magistrates, leaving the jurisdiction of the judges of the circuit and district courts of the United States unaffected by these considerations. But this view of the subject, while it removes one of the features of the law most obnoxious to the petitioners, entirely destroys the ground-work of the particular *mode* of relief, which some of them seem to desire, *i. e.* the engrafting a trial by jury on the proceedings prescribed by Congress. For no principle is better settled, or more reasonable in itself, than that no state legislature can in any manner control or interfere with the process of the courts of the United States, or prescribe their rules and forms of proceeding under the laws of Congress. (Wayman *v.* Southard, 10 Wheaton 1; Bank of U. S. *v.* Halsted, ibid 51; U. States *v.* Wilson, 8 Wheaton's R. 253; 3 Story's Com. 624—5; 1 Kent's Com. 394; Bean & al. *v.* Haughton, 9 Peters' R. 329.)

The Committee are therefore of opinion that it is not within the authority of the Legislature to modify, the proceedings under the act of Congress, (supposing, for the present, that it is valid for some purposes) so as to add to them specifically a trial by jury. But other questions arise. Can the Legislature provide for the grievance, which is alleged to exist, by an independent enactment? Can the person, arrested as a fugitive slave, before or after the certificate prescribed by the law of Congress is given, try his right to liberty in this Commonwealth by a collateral process, as the writ of habeas corpus, (or if the bill recommended by the Committee should pass,) by the writ of personal replevin? Or, on the

other hand, is the process under the act of Congress, exclusive in its character, and the certificate granted under it conclusive in its effect upon the rights of the parties?

These questions demand a farther consideration, both of the constitutionality and effect of the act. For, if it be unconstitutional, then clearly, any law of the Commonwealth on this subject, not contrary to its other obligations, will be valid—and even if the act be constitutional, still it depends upon other questions, whether a party arrested under it shall or shall not be at liberty to try the question whether he be in truth a slave, by some collateral process.

The first question, in this view of the subject, is whether the act in question is within the powers delegated to Congress. And your Committee confess, after a full examination of the question, that aside from the decisions upon the subject, their decided opinion would have been that no such authority, nor any authority on the subject, was conferred upon Congress by the constitution. Certainly there is no such express power given, and we do not see how it can in any way be fairly inferred. It is to be recollected, that the United States government is one of limited powers, having no authority excepting such as was vested in it by the constitution, and that all the powers, not so surrendered, were retained by the States, and can be exercised by them respectively. This would have resulted as a necessary truth from the nature of the case, and the relative position of the different governments; but it is expressly declared in art. x, of the amendments, "The powers not delegated to the United States by the constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." From what clause then in the constitution of

the United States is to be derived, by words or implication, any power in Congress upon the subject?

It must be, if at all, from the clause before quoted, (iv. art. § 2.) "No person held to service or labor in one State, under the laws thereof, escaping into another, shall, in consequence of any law or regulation therein, be discharged from such service or labor, but shall be delivered up on claim of the party to whom such service or labor may be due." This confers no authority upon Congress, in terms, or, as your Committee can see, by inference. It merely prohibits the States from passing certain laws, and enjoins a duty upon their citizens. But neither involves or draws after it any further power in the national government whatever. The clause is perfect in itself, and works its own object. Those who contend against this construction must maintain, that wherever the constitution prohibits legislation to the States, it authorizes legislation, to secure the object, in the United States: or, that wherever it imposes duties upon the authorities or people of the States, Congress may, without an express grant of power, direct the mode in which such duties shall be performed. But neither of these propositions is supported by authority, or has any foundation, which your Committee can see, in reason. There is no case, in the knowledge of the Committee, that gives countenance to either supposition, or where the power has been even attempted to be exercised on such a foundation. The States are prohibited from entering into any treaty, alliance or confederation, coining money; making any thing but gold and silver coin a tender; passing any bill of attainder, ex-post facto law, or law impairing the obligation of contracts; granting titles of nobility, &c., &c.; but when

was it ever maintained, that these prohibitions gave any authority to Congress, which it would not have had without them?

If the States disobey these injunctions, the remedy is not with Congress, but with the judiciary. The statutes passed in violation of these provisions are merely void, and so will be pronounced by the supreme court of the United States, whose appellate jurisdiction, in all questions of law or equity, on all such subjects, is secured for the very purpose of making them the peculiar, as they have always been the vigilant, guardians against any constitutional infringements by the States.

So it is, also, where certain duties are enjoined upon the authorities or people of the States. Thus art. iv. § 1: "Full faith and credit shall be given in each State to the public acts, records and judicial proceedings of every other State." Does this provision, in itself, invest Congress with the authority to enact how it shall be carried out, and prescribe the manner in which these acts, records and proceedings shall be verified? Certainly not, or else where was the necessity of giving this power by express grant, viz: "The Congress *may*, by general laws, prescribe the manner in which such acts, records and proceedings shall be proved, and the effect thereof." It could only have been because Congress, without this express grant, would have had no such power. So with other subjects, where authority is in words given to Congress, which in other parts of the instrument is denied to the States, or upon subjects, in relation to which duties are prescribed to the States.

If the Committee have been right thus far, it follows, also, that no authority is given to Congress upon this subject, by virtue of the concluding clause of art. i. § 9,

which provides that Congress may "make all laws which shall be necessary and proper for carrying into effect the foregoing (express and enumerated) powers, and all other powers vested by this constitution in the government of the United States, or in any department or office thereof," because it is not among the enumerated subjects in the previous part of the section, and no power, in relation to the matter, is any where in the constitution vested "in the government of the United States, or in any department or officer thereof." No general authority upon the subject of slavery, or upon a subject which would draw this after it as an incident, is any where given to the general government. This clause, as has been shewn by the learned commentator upon the constitution, (Mr. Justice Story) is nothing more than declaratory of a truth, which would otherwise have resulted by necessary and unavoidable implication. "The plain import of the clause is. (3 Story's Commentaries, 113–14,) that Congress shall have all the incidental and instrumental powers necessary and proper to carry into effect its express powers. It neither enlarges any power specifically granted, nor is it a grant of any new power to Congress. Whenever therefore, a question arises concerning the constitutionality of a particular power, the first question is whether the power be *expressed* in the constitution. If it be the question is decided. If it be not expressed the next inquiry must be whether it is properly an incident to an *express* power, and necessary to its execution. If it be, then it may be exercised by Congress. If it be not, Congress cannot exercise it." Both these questions in their application to the case under consideration, must be answered in the negative. No one will contend that the

power is expressly granted: and what power is expressly granted of which this would be a necessary or proper instrument? But it may be said that some means are necessary to enforce the duty enjoined in the constitution, and that it is not to be supposed these means would be left to be provided by the States. But an inconvenience, which may exist from the absence of powers in a given case, does not confer these powers, and the argument from it as to the intention of the founders of the constitution is only to be resorted to in cases, which are very doubtful upon the words.

But it seems to your Committee that, in this case, no such inconvenience would exist. The constitution, by its own force, worked its own purposes, and no farther legislation, either state or national, was necessary to enforce its provisions. Before the constitution, the right of recaption of a slave wherever found, existed as the common or customary law of nearly every State in the Union; for all the States, excepting only Massachusetts, then recognized slavery, as a legal institution existing within their own borders, and the subjects of it as property. The owner might then follow and seize his slave and take him away—as he might seize and take his horse or any other article of personal property. Now the effect of this constitutional provision, and your Committee infer its object, was two-fold. It extended this right of recaption, which existed by the common law of most of the States, to all of them, and prohibited any from changing or modifying it by legislation. This was all that was necessary for the security of the slave-holder, and it needed no national legislation in its aid or enforcement. If the master found his slave here, he might reclaim him. He would act to be sure, under this provision, at his peril.

If he took a person "on claim" who was *not* in truth *his slave*, he would be liable to relinquish his custody of such person on the process of *habeas corpus* or the writ *de homine replegiando*; and on the other hand, if any individual rescued from his custody or interfered in any way with the recaption of one actually his slave, such individual would be liable in damages to the amount of the injury done to the owner. Thus the slave would be placed on the same basis, and the owner have the same rights in relation to him, as he had in relation to every other species of personal property.

But it is necessary, on this question of construction, to examine somewhat the history of the legislation of the National Government, and of the States; and the judicial decisions, which have been made under their enactments.

The mere fact that this claim to the right of legislation has been made by Congress, and made, too, so early after the adoption of the constitution, has been insisted upon as a strong ground of presumption in favor of the existence of the right. And, undoubtedly, it is entitled to considerable weight. But it is to be remembered, on the other hand, that this claim has not been unresisted. Several States have attempted to legislate upon the subject, and, although some of them have passed laws substantially the same with that of Congress, yet, in others, they have been in direct opposition to this law, and there is implied, in any legislation upon the subject, a claim of power in the States, if not a denial of that assumed by Congress. The position taken by New York is the most prominent. The provisions of her laws upon the subject, are to be found in the revised statutes of that State—(part iii. ch. 9, sections 6 to 20 inclusive.) These provisions assume, as a right in the State government, the

power to regulate the whole process and proceedings, by which persons claimed as fugitive slaves shall be delivered up and the claim substantiated—and many of them are in direct contradiction of the power of Congress. They are, substantially, that such fugitives shall be arrested only upon habeas corpus, founded in the first instance upon proof; and upon the return, a trial is to be had before the judge, who is, however, first to give reasonable time to both parties to produce their proofs. If, on the final hearing, the claim of the person on whose suggestion the writ was issued, and the slavery of the supposed fugitive are substantiated, then judgment of return is to be rendered—if otherwise, the claimant is to pay $100 penalty, besides damages and costs. And the supposed fugitive has a right, if he prefers it, to have his writ de homine replegiando, and his trial by jury under it, notwithstanding the habeas corpus; and all magistrates are forbidden to grant process or certificate, except as thus provided, under a penalty of $500.

The Committee do not recite these provisions for the purpose of commending them, but merely to show the denial by this State of the exclusive power of Congress over the subject; and the fact that these provisions were recommended by John Duer, Benj. F. Butler, (the attorney general of the United States,) and John C. Spencer, who were the committee of revision, certainly entitle them to some respect, even if they do not invest them with any thing like authority.

The State of New Jersey, too, which had early attempted to regulate the subject, has recently passed a law, by a vote almost unanimous in both houses, giving to those claimed as fugitive slaves a trial by jury, substantially, it is believed, like that provided in New York.—

On the other hand, the legislature of Pennsylvania has rejected an application for such a law.

While there is this conflict of legislation, your Committee are sorry to find that the judicial opinions upon the respective claims of the State and national governments, are few, conflicting, and in some respects unsatisfactory. The first case which they will notice is that of *Wright alias Hall* vs. *Deacon*, (5 Serg. and R. 62,) decided by the supreme court of Pennsylvania.

This was a writ de homine replegiando against a jailer. The facts were, that the plaintiff was claimed as a fugitive slave by one Gale, of Maryland, who arrested him and carried him before a magistrate. The magistrate committed the plaintiff to prison, till evidence could be procured in behalf of the claimant. The plaintiff, while in this situation, sued out a writ of habeas corpus, returnable before Judge Armstrong, who heard the parties, and, adjudging the plaintiff to be a slave, remanded him into the custody of defendant, giving also a certificate according to the law of Congress. The plaintiff then sued out this writ, and the court decided that he could not maintain it. The question of the constitutionality of the law of Congress was not even raised at this trial, but as the court undertake to give a construction of its meaning and effect, its validity must of course have been assumed. They say in their opinion, that, as the certificate of Judge Armstrong was conformable to the requisitions of the act of Congress, *therefore* the plaintiff was not entitled to the writ de homine replegiando. The Committee would remark upon this opinion,

1. That it was entirely extra-judicial, not called for by the case. The plaintiff having voluntarily sued out a writ of habeas corpus against the same defendant, and

the question of his right to liberty having been tried and decided against him under it, he could not, of course, try over again the same question by another and concurrent remedy. It was *res judicata*, a thing judicially and conclusively settled between the parties, and on a process too, originating with the plaintiff himself, who chose his own mode of trial; and he could not afterwards disturb the question. And this view derives no strength from the act of Congress, but, independently of it, the decision was clearly right upon the well known principles of law.

2. The opinion as to the effect of the law is directly contradictory to that of the supreme court of Massachusetts, hereafter cited: (2 Pick. R. infra; see also Fanny *v.* Montgomery and others, 1 Breese Repts. 188;) although it seems to have the sanction of Mr. Sergeant: (Sergeant's Const. Law, pp. 398.) Other observations which apply to this case, with others, will be made hereafter.

A case, entitled to more consideration, was decided by our own supreme court, *Commonwealth* v. *Griffith*, 2 Pick. R. 11. This was an indictment for an assault and battery by the defendant on a negro, named Randolph. The defence was, that Randolph was a slave, formerly the property of one McCarty of Virginia, deceased, and while such, fled into this State. The defendant was attorney of the administrator of McCarty, and, as such, after consulting the district judge, seized Randolph and held him in custody. The question was, whether these facts amounted to a justification of the seizure. The court held that they did, and in their opinion express the belief that the law of Congress upon this subject is constitutional and valid.

In relation to this case it is to be remarked, in addition

to the fact that this question was but one of many raised at the trial:

1. That there were but three judges upon the bench, and one of them dissented from the opinion given.

2. That the power of Congress to legislate at all upon the subject was not discussed, but the constitutionality of the law was impugned upon the ground, that this particular *act* was void, as against other provisions of the constitution not yet noticed; and the whole argument in the opinion is directed against this ground only, while the right in Congress to pass some law upon the subject seems to have been taken for granted.

3. No opinion as to the validity or effect of the law, was called for by the case. Griffith's right to seize his slave existed under the constitution, independently of the law of Congress. If no such law had been made, his defence would have been perfect, for the master, under the constitution, would have had the right to take the slave as his property any where, and the State could not divest him of it.

The case, however, of *Jack* vs. *Martin*, which was finally disposed of in the court of errors of New York, Dec. 1835, (14 *Wendell's Reps.* 507,) is the one under which all the questions upon this subject have been the most fully and elaborately discussed. This was on a writ *de homine replegiando*, sued out by plaintiff, after a certificate by the recorder of New York, substantially in compliance with the law of Congress, though the process upon which it was granted was that of *habeas corpus*. The constitutionality of the law of Congress was not necessarily involved in the decision, for the same reason that it was not in the case in the 2d Pick. R. and the case was finally decided against Jack, solely on the ground that

having by his pleas, admitted that he *was the slave* of the defendant, and had *escaped* from her service, the defendant was entitled to judgment, and this, whether the law of Congress was valid or invalid. But both courts before which it came, considered the question of its constitutionality. In the supreme court, Judge Nelson gave an opinion, (12 Wendell, 314,) that the act of Congress was authorized by the constitution, and that the statute of the State was unconstitutional and void. In the higher court, to which the case went on error, Chancellor Walworth delivered an opinion exactly opposite in its character, he holding, after a most thorough and learned discussion, that the act of Congress was unauthorized by the constitution, and consequently void—while he maintained the validity of the State laws. Mr. Senator Bishop read an opinion, dissenting from the views of the chancellor.

Another case of somewhat similar character is that of *Alexander alias Nathan Himsley* vs. *Haywood*, recently decided by the court of New Jersey. There is yet no authorized report of the case, and your Committee depend upon the account of an intelligent lawyer, who was present at the trial, which they have been at the trouble to obtain. It seems that Nathan, who was claimed as a runaway slave, was carried before one Haywood, a justice of the peace of the county of Burlington, who gave a certificate that he was a slave, &c., agreeably, as well to the act of Congress as the then statute of the State; but instead of delivering him to the complainants, committed him for the time to prison, though without legal warrant. The case ultimately turned upon this point, i. e. of the authority of the magistrate to commit to prison,

though it is said that in the course of the proceedings, the judges severally expressed strong doubts as to the validity of these laws.

Such are all the cases, which have arisen in any of the courts of the United States so far as is known to your Committee, involving the constitutionality of the act of Congress, or in which this question has arisen, except those which are loosely reported in the newspapers, and which your Committee did not think sufficiently authenticated to demand their consideration.

There are some other cases, (2 S. & R. 308; 4 S. & R. 305; 9 Johns. R. 67; 1 Wash. C. C. R. 501; 4 Wash. C. C. R. 46, 306, 326; 3 Am. Jur. 406; 1 Breese R. ub sup; 2 Marsh. R. 301,) where the act came more or less directly before the court; but, in neither, was the law attempted to be enforced by the court; nor was the question of its constitutionality in any way raised or alluded to. And, in relation to the cases which were particularly reviewed, it will be remembered, that neither called for any decision of the point; that, in but one, (that in Wendell,) was the question as to the power of Congress to pass any law upon the subject, discussed; that the two opinions in Pennsylvania and Massachusetts, in the first of which the constitutionality of the act was *assumed*, as in the last it was *declared*, are in direct opposition in relation to its effect, as will be more particularly shown hereafter. Your Committee, then, could not say, aside from the peculiar relation we bear to the Supreme Judicial Court of this Commonwealth, that the question ought to be considered so conclusively settled, by judicial interpretation, as to prevent, or render useless, a recurrence to the constitution itself, and to the general principles of construction, which tend to develope its true intent and

meaning. Of the result of such an examination, your Committee have already expressed their opinion. They would, however, hesitate long before recommending any act of legislation, which would be in conflict with, or in disregard of, any opinion of our own supreme court, the intimations of which, as well from its place in our political system, as the character of the eminent men who have composed it, are certainly entitled to the highest consideration. And they are happy to find, that no such course, (as will appear hereafter,) is necessary for the purpose of carrying out the views before expressed by them.

There are other objections to the act of Congress, which, in their character, admit the power of that body to pass laws upon the subject of reclaiming fugitive slaves, but which insist, that this power has not been exercised, agreeably to the constitution, in the act in question.

It is said that this act is in violation of the last clause of art. iii. § 2, and also of art. vii. in amendment of the constitution, which provide for a trial by jury in all cases of crimes, and all suits at common law, where the value in controversy shall exceed twenty dollars. It is insisted that these provisions were intended to, and upon a fair construction do, cover every case of the trial of rights of whatever character, without any other limitation than the expressed one as to the importance of the matter in dispute. In answer to this suggestion, it is said, in addition to the denial of the propriety of the construction, that the process and proceedings provided in the act, are not conclusive in their effect, but are merely preliminary; and that in this respect they are entirely analogous to the primary examinations for suspected crimes before a magistrate, who never has the aid of a jury, because he does not decide definitely upon the guilt or innocence of the

accused. And that the certificate under the act is preliminary, supposing, or at least admitting of, a future trial of the question of liberty is certainly a position which has great support in authority. (See the case before considered, and 3 Story's Comm. on Const. 677–8.)

It is again said in answer, that none of the provisions of the constitution have any reference to *slaves*, but establish the rights of *citizens*, who alone can take advantage of them. But is not this begging the very question in dispute? A person who is seized here is *prima facie* a freeman, and the very matter to be tried is, *whether* he is a slave; and can that be *assumed* in the outset, in order to give jurisdiction to the magistrate, and validity to his judgment?

The Committee dismiss this part of the subject for the present, because these different positions will be brought in view, under the next succeeding head.

The remaining objection to the act of Congress, is founded upon the fourth article of the amendment of the constitution, which secures the people "against all unreasonable searches and seizures," and provides that "no warrants shall issue but upon probable cause, supported by oath or affidavit," and upon a clause in the fifth article, that no person shall be "deprived of life, liberty, or property, without due process of law."

This last clause is but an enlargement of the provision of the magna charta,—of which, the latter words, *(per legem terrae,)* have always been construed to mean, by due presentment or indictment of a grand jury. (2d Inst. 50; 1 Tucker's Blk. App. 304; 2 Kent's Com. 10.) And Mr. Justice Story says, (3 Com. 661,) that the clause "in effect affirms, the right of trial according to the process and proceedings of the common law."

It is manifest that the process and proceedings under the act of Congress are in violation of the privileges secured by these clauses, if they are at all applicable to this subject. But their application, as in the other case, is denied because the subjects of the process are *assumed* to be slaves.

These questions were fully discussed in the case before cited, in our own courts, (2 Pick.,) for it was from this part of the constitution that the prosecuting officers drew their arguments against the validity of the law of Congress. Parker, C. J. in giving the opinion of the majority of the court, thus disposes of them:—"It is said, that the act which is passed on this subject is contrary to the amendment of the constitution securing the people in their persons and property against seizures, &c. without a complaint on oath, &c. But all the parts of the instrument are to be taken together. It is very obvious that *slaves are not parties to the constitution, and the amendment has relation to the parties.* * * *But it is objected that a person may, in this summary manner, seize a freeman. It may be so, but it would be attended with mischievous consequences to the person making the seizure, and a habeas corpus would lie to obtain the release of the person seized.*" And if a habeas corpus, then of course the concurrent remedies.

The principle here distinctly stated, when carried out, relieves the act of Congress of all its obnoxious features, and places the question, *under the law*, precisely where the Committee would have placed it *under the constitution*, without the law. It holds that the proceedings are constitutional as to *slaves*, and unconstitutional as to *freemen*, and gives the person seized the right to try the question, as to his character, by any suitable, independent

process. And this principle must extend to his situation either before or after certificate, for the jurisdiction of the magistrate, upon the same reasoning, must be special and limited, depending entirely for its foundation upon the fact whether the person so seized be a slave; for, if he be not, the whole proceedings are void, as against the express provisions of the constitution. It makes, then, the claimant act at his peril throughout, and gives the person seized an opportunity to try, in another form, the applicability of the process to him; and that, too, wherever he chooses. It is in this view, if he be a freeman, precisely like the case where A is arrested on a process against B, and where of course A can be delivered from his imprisonment by *habeas corpus*, or the writ *de homine*, or sue the officer in damages. (See, as to limited jurisdiction, Wise *v.* Withers, 3 Cranch 331, and 19 Johns' R. 7.)

The Committee know that this construction of the law, thus given by our supreme court, is not in accordance with the decision as to its effect in the case decided by the supreme court of Pennsylvania,—Hall alias Wright *v.* Deacon, before cited,—but it seems to be directly supported by the supreme court of Illinois. (Fanny *v.* Montgomery, Breese's Repts. 188.) It was there decided, that "when the defendant, in an action of assault and battery and false imprisonment, justifies, under a certificate granted by a justice of the peace, in pursuance of the act of Congress respecting fugitives from labor, the plea must show that all the facts existed at the time of granting certificate, contemplated by that act." That case was put distinctly on the jurisdiction of the justice. The Committee cannot see any other ground on which the validity of the act of Congress, under the

clauses of the constitution last cited, can be maintained for a moment, but upon the construction of its effect given by our supreme court—which, while it protects the process from abuse, gives every reasonable security to the master.

Your Committee are therefore of opinion, that whether the law be considered unconstitutional on the one hand, or valid on the other, upon the construction recognized by the supreme court of this Commonwealth, the same result must be arrived at. In either case, a person seized under the act of Congress, before or after certificate given, may have an independent process, under which he can try his right to the character of a freeman; and in either view, any special legislation upon the particular subject, would be wholly unnecessary.

And why should not a person so seized have these means of trial? If he be a slave, he is to be given up to his master; but may he not have the question, whether he be in truth a slave, tried in a manner adequate to its importance to himself and his offspring? And why should it not be tried too where he is, before (on the certificate of any magistrate whom the claimant may select, granted on a summary and ex-parte examination,) he is carried away, where, it may be, he can have no means of defence left to him? The trial is to him of tremendous interest, involving consequences, in some respects, even greater than those which await the judgment on the most abhorred crime known in the law. For our constitution provides that even this shall "not work corruption of the blood." But a judgment against one, condemning him as a fugitive slave, does work corruption of blood, and forfeiture to himself, his children, and his children's children, to the latest generation.

It may be said, that, in times of excitement, this process, with this construction, may not be effectual; and that those, who are really slaves, will not be given up. But such an argument is an imputation upon our authorities and citizens; and might as well be urged against all our laws, for all of them are useless, unless we can trust in the integrity of our tribunals for their proper administration.

Your Committee, then,—while they would not propose to follow the examples of New York and New Jersey, in the enactment of any special provisions of law upon the subject,—and while they should have recommended the accompanying bill, independently of any regard to the condition of those, claimed as fugitives from labor,—cannot yet see any thing, in the fact, that the writ of personal replevin may be used by them, in the investigation of their claim to freedom, which should afford the slightest reason against its adoption. On the contrary, they look to this use of the writ, as one of its just and legitimate offices.

All which is respectfully submitted.

For the Committee,

JAMES C. ALVORD.

Commonwealth of Massachusetts.

In the Year One Thousand Eight Hundred and Thirty-Seven.

AN ACT

To restore the Trial by Jury, on questions of personal freedom.

BE *it enacted by the Senate and House of Representatives, in General Court assembled, and by the authority of the same, as follows:*

SEC. 1. If any person is imprisoned, restrained of his liberty, or held in duress, unless it be in the custody of some public officer of the law, by force of a lawful warrant or other process, civil or criminal, issued by a court of competent jurisdiction, he shall be entitled, as of right, to the writ of personal replevin, and to be thereby delivered in the manner hereinafter provided.

SEC. 2. The writ shall be issued from and returnable to the court of common pleas, for the county in which the plaintiff is confined, and shall be issued fourteen days at least before the return day thereof.

Sec. 3. It shall be directed to the sheriff of the county, or to any of the coroners thereof, and shall be served by either, to whom it shall be delivered, without delay.

Sec. 4. The said writ shall be in the form following, viz:

Commonwealth of Massachusetts.

——— ss. *To the sheriff of our county of* ———
(L. S.) *(or either of the coroners thereof.)* Greeting.

We command you that, justly and without delay, you cause to be replevied C. D. who (as it is said) is taken and detained at ———, within our said county, by the duress of G. H., that he the said C. D. may appear at our court of common pleas, next to be holden at ———, within our county aforesaid, then and there in our said court to demand right and justice against the said G. H. for the duress and imprisonment aforesaid, and to prosecute his replevin as the law directs:

Provided the said C. D. shall, before his deliverance, give bond to the said G. H. in such sum as you shall judge reasonable, and with two sureties at the least, having sufficient within your county, with condition to appear at our said court to prosecute his replevin against the said G. H., and to have his body there ready to be re-delivered, if thereto ordered by the court; and to pay all such damages and costs as shall be then and there awarded against him. Then, and not otherwise, are you to deliver him. And if the said C. D. be by you delivered at any day before the sitting of our said court, you are to summon the

said G. H. by serving him with an attested copy of this writ, that he may appear at our said court to answer to the said C. D.

Witness, L. S. Esq. at B. the —— day of ——, in the year ——. A. B. clerk.

Sec. 5. No person shall be delivered from his imprisonment or restraint, by force of such writ, until he shall give bond in the manner expressed in the preceding section; and the bond shall be returned with the writ, in like manner as a bail bond is returned, and shall be left in the clerk's office, to be delivered to the defendant when he shall demand it.

Sec. 6. The officer, who serves the writ, shall be answerable for the insufficiency of the sureties in such bond, in like manner as he is answerable for taking insufficient bail in a civil action.

Sec. 7. If the plaintiff shall maintain his action, and shall make it appear that he was unlawfully imprisoned or restrained, he shall be discharged, and shall recover his costs of suit against the defendant, as well as damages for the said imprisonment and detention.

Sec. 8. If the plaintiff shall not maintain his action, the defendant shall have judgment for his costs of suit, and also for such damages, if any, as he shall have sustained by reason of the replevin.

Sec. 9. If it shall appear that the defendant is bail for the plaintiff, or is entitled to the custody of the plaintiff, as his child, ward, servant, apprentice or otherwise, he shall have judgment for a re-delivery of the body of the plaintiff, to be held and disposed of according to law.

Sec. 10. If it shall appear, from the return of the writ of personal replevin, that the defendant has secreted or conveyed away the plaintiff's body, so that the officer cannot deliver him, the court shall, on motion, issue a *capias* to take the defendant's body, and him safely keep, so that he may be had at the then next term of the court, to traverse the return of the said writ of personal replevin; but the defendant may give, and the officer serving the same shall receive, bail, as in civil cases, for his appearance as aforesaid, in such sum as the officer may judge reasonable.

Sec. 11. At the term, at which the capias is returned, the defendant may deny, by plea, the return on the writ of replevin, and if it shall appear, on the trial thereof, that he is not guilty of secreting or conveying away the plaintiff, as set forth in the return, he shall be discharged and recover his costs.

Sec. 12. If the defendant shall not traverse the said return as aforesaid, or if, upon the said traverse, the issue, on trial, shall be found against him, then an *alias writ of capias* shall be issued against him, and he shall thereupon be committed to the common jail, there to remain in close custody until he shall produce the body of the plaintiff, or prove him to be dead; and if the defendant shall suggest such death at any time after committal as aforesaid, then the court shall impannel a jury to try the fact, at the expense of the defendant; and if the death be proved, the defendant shall be discharged.

Sec. 13. If, at any time after such return of secretion and conveying away as aforesaid, the defendant shall produce the body of the plaintiff in the court to which the writ of personal replevin was returned, or

in which the suit is pending, the court shall deliver the plaintiff from restraint, upon his giving bond agreeably to the condition of the writ of personal replevin: and for want of such bond, the plaintiff shall be committed to abide the judgment on the replevin, and, in either case, the suit shall be proceeded in, as if the plaintiff had been delivered on the writ of personal replevin.

Sec. 14. Either party may appeal from any judgment upon either of the matters aforesaid to the Supreme Judicial Court, as in common civil actions—and in case of an appeal from the judgments which may be rendered under the writs of *capias* aforesaid, the whole case shall be carried up to the Supreme Judicial Court, and be there disposed of, as it ought to have been in the Court of Common Pleas, if there had been no appeal.

Sec. 15. The writ of personal replevin may be sued out by any person for and in behalf of the plaintiff, and may be prosecuted to final judgment, without any express power, for that purpose: *provided*, that the person so appearing for the plaintiff, shall, at any time during the pendency of the suit, when required by the court, give security in such manner as the court shall direct, for the payment of all damages and costs that shall be awarded against the plaintiff.

Sec. 16. If the name of the defendant, or the person to be delivered be unknown or uncertain, then in any writ, proceeding, or process under this act, they may respectively be described, and proceeded with, as is prescribed in the sixth and seventh sections of the one hundred and eleventh chapter of the Revised Statutes, in the writ of *habeas corpus*.

SEC. 17. The thirty-eighth section of the one hundred and eleventh chapter of the Revised Statutes, is hereby repealed.